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No. 01-238

In the Supreme Court of the United States

BMW MANUFACTURING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Harbor Maintenance Tax, 26 U.S.C. 4461, applies to merchandise that is unloaded at a port and then later admitted to a Foreign Trade Zone.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 241 F.3d 1357. The opinion of the Court of International Trade (Pet. App. 14a-27a) is reported at 69 F. Supp. 2d 1355.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2001. The petition for rehearing and suggestion for rehearing en banc was denied on May 9, 2001 (Pet. App. 30a). The petition for a writ of certiorari was filed on August 7, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1986, Congress enacted the Harbor Maintenance Tax (HMT), 26 U.S.C. 4461, to help fund various harbor improvement programs. That statute imposes a tax on port use by importers, exporters,[1] domestic shippers and passenger liners. The tax is imposed at the rate of "0.125 percent of the value of the commercial cargo involved." 26 U.S.C. 4461(b). For "cargo entering the United States," the tax is imposed on the importer "at the time of unloading." 26 U.S.C. 4461(c)(1)(A), (2)(B).

2. The present case involves foreign merchandise that was unloaded at a port of the United States and then transported by petitioner to a foreign trade zone facility (FTZ) located in Spartanburg, South Carolina. After paying the HMT due on the shipment, petitioner filed a complaint in the United States Court of International Trade to contest whether that tax properly applies to merchandise that is unloaded at a port and thereafter transferred within the United States to an FTZ facility.

3. The Court of International Trade held that the HMT applies in this situation because the statute "does not include specific exemption for cargo that is admitted into a foreign trade zone after unloading at a covered port." Pet. App. 19a. The court rejected petitioner's argument that merchandise admitted into a FTZ should be treated as exempt from the HMT under 19 U.S.C. 81c(a), which exempts merchandise entered at a foreign trade zone from customs duties until the merchandise is thereafter formally entered into the

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[1] Customs suspended the provisions for export vessel movements following the decision in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998).

United States. The court concluded that the HMT "is a generalized Federal charge for the use of certain harbors" and "is not by its nature a customs duty" within the meaning of the exemption statute. Pet. App. 19a (quoting *Texport Oil Co.* v. *United States*, 185 F.3d 1291, 1297 (Fed. Cir. 1999)).

The court next rejected petitioner's argument that the language of the HMT statute that specifies that "administrative and enforcement provisions of customs laws and regulations shall apply" to the HMT "as if such tax were a customs duty" (26 U.S.C. 4462(f)(1)) requires that the tax be treated as a customs duty for purposes of the FTZ exemption. Pet. App. 19a. The court held that the fact that the tax is treated as a customs duty for purposes of administration does not convert the tax into a customs duty for the purposes of the exemption contained in 19 U.S.C. 81c(a). Pet. App. 20a ("[t]o treat something for administration and enforcement, as something else, does not make it that other thing for all purposes."). The court noted that the HMT constitutes a tax, rather than a customs duty, because it is a generalized charge for port use that "applies whether the goods are exported, imported or shipped between domestic ports." *Id.* at 21a. The court emphasized (*id.* at 22a) that the HMT is further unlike a customs duty because liability for the tax attaches to goods simply "at the time of unloading." 26 U.S.C. 4461(c)(2)(B)). Petitioner's contention that HMT liability should not attach until sometime *after* the goods have been unloaded, transferred to a FTZ and then "*perhaps* enter the United States customs territory conflicts with" the plain text of the statute. Pet. App. 22a.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court noted that Congress "has provided express

exemptions from the HMT for certain port uses"—such as shipments involving Alaska, Hawaii and United States possessions and for "bonded commercial cargo" that enters the United States for transportation to a foreign country. Pet. App. 6a (citing 26 U.S.C. 4462(b) and (d)(1)). Because Congress "expressly provided for the exemption of certain merchandise from the HMT" and did *not* expressly provide an exemption for merchandise delivered to a FTZ, the court held that "it is reasonable to conclude that it did not so intend. *Expressio unius est exclusio alterius.*" Pet. App. 6a-7a.

The court of appeals also agreed with the Court of International Trade that "just because the 'administrative and enforcement provisions' of the customs laws apply to the HMT does not mean that all provisions of the customs law apply." Pet. App. 8a. The court explained that, if Congress had intended to apply substantive provisions of the customs law "such as the customs duty exemption in § 81c(a)" to the HMT, "it would not have limited" the reference to customs provisions "to those that implicate only the 'administrati[on] and enforcement' of the HMT." Pet. App. 8a.[2]

The court noted that the plain language of the HMT statute makes "clear that the tax is due immediately upon cargo unloading, without regard to the destination of the merchandise." Pet. App. 9a. The court concluded that Congress "could not have intended that there be an HMT exemption for goods admitted into an FTZ without explicitly providing for one, as it did in the case of 'bonded commercial cargo,' I.R.C. § 4462(d)(1),

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[2] The court rejected petitioner's reliance on *IBM* v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000), cert. denied, 121 S. Ct. 1167 (2001), for that case merely held that judicial enforcement is "enforcement" within the language of the HMT statute. Pet. App. 8a.

because it is a general tax on port use that is not conditioned on formal entry into the customs territory of the United States." Pet. App. 9a. The court explained that the HMT is assessed on cargo "without regard to whether that cargo formally enters the customs territory of the United States" while the exemptions for FTZ merchandise contained in 19 U.S.C. 81c(a) are "targeted at duties and taxes that attach upon formal entry into the United States customs territory." Pet. App. 11a (citing S. Rep. No. 1107, 81st Cong., 1st Sess. 3-4 (1949)).[3]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Congress imposed the HMT upon "any port use" in "an amount equal to 0.125 percent of the value of the commercial cargo involved." 26 U.S.C. 4461(a) and (b). Except for goods being exported, liability for the HMT attaches "at the time of [cargo] unloading." 26 U.S.C. 4461(c)(2)(B). Congress directed the Treasury to prescribe regulations "to carry out the purposes" of the HMT and to "provid[e] for the manner and method of payment and collection of th[is] tax" (26 U.S.C. 4462(i)). Pursuant to that direction, the agency has specified that (19 C.F.R. 24.24(e)(2)(i) (emphasis added)):

> when *imported cargo* is unloaded from a commercial vessel at a port within the definition of this section,

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[3] The court of appeals also upheld the determination of the CIT that petitioner, as the applicant for admission of the merchandise into the FTZ, was the party liable for payment of the HMT under 26 U.S.C. 4461(c)(1). Pet. App. 12-13a.

> and *destined for* either consumption, warehousing, or *foreign trade zone admission*, the importer of that cargo, or in the case of foreign trade zones, the person or corporation responsible for bringing merchandise into the zone, *is liable for the payment of the port use fee at the time of unloading.*

Petitioner incorrectly asserts (Pet. 22 n.12) that the agency's regulation alters the liability provision of the HMT statute. The regulation, like the statute, clearly specifies that the HMT liability for imported goods attaches "at the time of unloading." 26 U.S.C. 4461(c)(2)(B); 19 C.F.R. 24.24(e)(2)(i). Because the agency's regulation reasonably implements the requirements of the statute, it should be upheld by the courts.

2. The Foreign Trade Zone Act, 19 U.S.C. 81c (1994 & Supp. V 1999), exempts merchandise admitted into a foreign trade zone from customs duties until the merchandise is thereafter formally entered into the United States.[4] The court of appeals correctly concluded that this statute does not preclude application of the HMT to

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[4] A foreign trade zone is an area inside United States territory which, for customs purposes, is considered outside of United States Customs territory. See *Hawaiian Independent Refinery* v. *United States*, 460 F. Supp. 1249 (Cust. Ct. 1978). Foreign trade zones "are accorded special treatment under the customs laws." *Citgo Petroleum Corp.* v. *The United States Foreign Trade Zones Board*, 83 F.3d 397, 399 (Fed. Cir. 1996). In particular, under 19 U.S.C. 81c(a), foreign merchandise is generally not subject to the payment of duties unless or until it is subsequently imported into the U.S. Customs territory. See Staff of House Comm. on Ways and Means, 103d Cong., 1st Sess., *Overview and Compilation of United States Trade Statutes* 49 (Comm. Print 1949). If merchandise admitted to an FTZ is consumed within that zone, however, customs duties may properly be imposed at that time notwithstanding the exemption in Section 81c(a). *Nissan Motor Mfg. Corp.* v. *United States*, 884 F.2d 1375, 1378 (Fed. Cir. 1989).

merchandise that is unloaded at a United States port before being admitted to a foreign trade zone. Pet. App. 6a-9a.

a. The statute and the regulation both specify that the HMT applies to cargo at the time it is unloaded at a port. 26 U.S.C. 4462(c)(2)(B); 19 C.F.R. 24.24(e)(2)(i). As the court of appeals emphasized (Pet. App. 6a), Congress provided an exemption from the HMT for shipments involving "Alaska, Hawaii, and possessions" (26 U.S.C. 4462(b)) and for "bonded commercial cargo entering the United States for transportation and direct exportation to a foreign country." 26 U.S.C. 4462(d)(1).[5] The fact that Congress elected to exempt these specific, narrow categories of shipments from the HMT, but did not elect to exempt shipments to an FTZ from the tax, reflects that Congress intended the plain text of the statute to govern. As the court of appeals emphasized, Congress obviously knows how to provide an exemption from the tax and did not elect to do so for FTZ shipments: "Where it did not so provide, it is reasonable to conclude that it did not so intend. *Expressio unius est exclusio alterius*." Pet. App. 6a.[6]

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[5] This exemption parallels 19 U.S.C. 1553, which provides an exemption from customs duties and taxes for merchandise "entered for transportation in bond through the United States by a bonded carrier * * * and exported under such regulations as the Secretary of the Treasury shall prescribe * * * ." 19 U.S.C. 1553(a). Petitioner's assertion that foreign trade zones should be accorded even more freedom from taxation than bonded warehouses (Pet. 9-10 n.5) is simply at odds with the clear text of the statute, which expressly exempts merchandise sent in bond for exportation to another country while it does not expressly exempt merchandise unloaded in a port before it is shipped to a foreign trade zone.

[6] Petitioner errs in seeking to rely (Pet. 25) on agency rulings issued under a different statute that provides an exemption from

b. The court of appeals also correctly rejected petitioner's contention that the HMT should be treated as if it were a "customs duty" or an "excise tax" that would be within the exemption afforded for free trade zone merchandise by the FTZ Act. The fact that Congress directed the "administrative and enforcement provisions of customs laws" to apply under the HMT "as if such tax were a customs duty" (26 U.S.C. 4462(f)(1)) obviously does not *make* "such tax * * * a customs duty." To the contrary, that formulation necessarily recognizes that the tax is *not* a customs duty.

As the court of appeals concluded, neither in substance nor in form does the HMT come within the ordinary understanding of a "customs duty." Pet. App. 8a. The HMT applies to any "port use" involving "commercial cargo"—a term that Congress defined to include purely domestic shipments of cargo and passenger cruise ships (26 U.S.C. 4462(a)(1) and (3)). The HMT thus applies by its terms to categories of port use that have no liability for customs duties. Moreover, as the court of appeals emphasized, Congress did not make the exemptions applicable for customs duties generally available to persons to whom the HMT applies. Instead, Congress directed only that the "administrative and enforcement provisions of customs laws" apply to the

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any "duty *and internal-revenue tax*" for supplies provided to aircraft engaged in foreign trade. 19 U.S.C. 1309(a) (emphasis added). In *Citgo Petroleum Corp.* v. *United States*, 104 F. Supp. 2d 106, 108-109 (Ct. Int'l Trade 2000), the Court of International Trade concluded that the exemption created by 19 U.S.C. 1309 is broad enough to apply to the HMT. The FTZ Act involved in the present case, however, provides an exemption only for duties or excise taxes imposed on entry into the customs territory of the United States and does not apply to all "internal-revenue tax[es]." See 19 U.S.C. 1309(a).

HMT. 26 U.S.C. 4462(f)(1).[7] As both of the courts below concluded, if Congress had intended to apply substantive provisions of customs law "such as the customs duty exemption in [the FTZ Act]" to the HMT, "it would not have limited" the reference to customs provisions "to those that implicate only the 'administrati[on] and enforcement' of the HMT." Pet. App. 8a.[8]

The passage quoted by petitioner (Pet. 19-20) from *Faber, Coe & Gregg* v. *United States*, 19 C.C.P.A. 8 (1931), demonstrates petitioner's error. It states that "[r]egardless of how taxes may be designated by the Congress, if they are imposed on imports while in customs custody, they are essentially customs duties and are determinable and collectible as prescribed by law." 19 C.C.P.A. at 12 (citations omitted). The HMT is *not* imposed on imports while in Customs's custody. Instead, it is imposed on merchandise *at the time of port use*, regardless of the destination of the goods or whether Customs takes custody of the merchandise. 26 U.S.C. 4461(c)(2)(B).[9] The exemption available under

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[7] The Customs Court (now the Court of International Trade) has long distinguished statutes that establish collection procedures from "preference[s] or exemption[s] under customs laws." See *Chicago Heights Distributing Co.* v. *United States*, 55 Cust. Ct. 254, 259 (1965).

[8] Petitioner's reliance (Pet. 20 n.10) on *Beercut-Vandervoot & Co.* v. *United States*, 44 C.C.P.A. 28 (1956), is misplaced. The court expressly noted that the internal revenue tax at issue in that case "attache[d] to imported distilled spirits at the time of importation" and not at the time of unloading. 44 C.C.P.A. at 32.

[9] Petitioner errs in relying (Pet. 15-16) on *United States Shoe*, *supra*, for the proposition that the HMT is a customs duty for purposes of the FTZ exemption provision. In that case, this Court held that the tax imposed by the HMT was not a permissible "user fee" and was therefore invalid as applied to exports under the Export Clause. 523 U.S. at 363. The Court held that the provi-

the FTZ Act, by contrast, applies only to the category of assessments that are made "*when the merchandise [is] sent into customs territory.*" Pet. App. 11a (quoting S. Rep. No. 1107, 81st Cong., 2d Sess. 3-4 (1949)).

c. Under petitioner's interpretation, the HMT would apply only when merchandise is withdrawn from an FTZ (possibly many years after the port use) and entered for consumption. The plain language of the statute, however, expressly states that the HMT is imposed on "port use," 26 U.S.C. 4461(a), and that liability for the HMT attaches at the time of the "unloading" of the merchandise at the covered port, 26 U.S.C. 4461(c)(2)(B). Because the HMT is imposed for port use and is due immediately upon unloading, it is irrelevant whether the merchandise next travels to a free trade zone and is not immediately entered into the customs territory of the United States.[10] No court has ruled to the contrary.

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sions of the HMT that incorporate the provisions for "administration and enforcement" of the customs laws require that the HMT be "treated as a customs duty for purposes of jurisdiction." *Id.* at 366. The Court did not hold that the HMT was to be treated as a customs duty in applying substantive exemption provisions such as the FTZ Act.

[10] Petitioner errs in relying (Pet. 23-24 & n.13) on the Merchandise Processing Fee (MPF). That fee is dependent on importation while the HMT is not. *Texport Oil Co.* v. *United States*, 185 F.3d at 1296-1297. The MPF is imposed on the importer "[f]or the processing of merchandise that is formally entered or released [from customs custody] during any fiscal year." 19 U.S.C. 58c(a)(9)(A). See also 19 U.S.C. 58c(b)(8)(E)(ii). The MPF is expressly designed to recoup "processing" costs incurred by the government on the entry of merchandise into the United States customs territory. By contrast, the HMT is imposed "on any port use," 26 U.S.C. 4461(a), and recoups the costs associated with the use of the port itself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2001

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* The Solicitor General is recused in this case.